

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of K. BROOKS, JR., Minor.

UNPUBLISHED

January 16, 2014

Nos. 316245, 316246
Oakland Circuit Court
Family Division
LC No. 12-799418-NA

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the order terminating their parental rights to the minor child. Respondent mother's parental rights were terminated pursuant to MCL 712A.19b(3)(b)(ii) (parent had opportunity to prevent abuse and failed to do so), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to parent). Respondent father's rights were also terminated pursuant to MCL 712A.19b(3)(g) and (j), as well as subsections (b)(i) (parent's act caused injury or abuse) and (k)(iii) (parent abused child by battering, torture or other severe physical abuse). We affirm.

I. FACTUAL BACKGROUND

In August 2012, the court authorized the initial petition in this matter, which requested the court to take jurisdiction of the minor child and terminate both respondents' parental rights. The petition alleged that the child, born in March 2012, had been severely physically abused. At the time, the child was in the hospital recovering from his injuries, which consisted of multiple rib and clavicle fractures. At a combined trial and statutory grounds hearing, the court received testimony from numerous witnesses involved in the investigation of the child's injuries, as well as both parents. After hearing all the evidence, the court assumed jurisdiction over the minor child and terminated respondents' parental rights. This appeal followed.

II. STANDARD OF REVIEW

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights if the court also finds that termination of parental rights is in the best interests of the child. MCL 712A.19b(5). Whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence. *In re Moss*,

301 Mich App 76, 83; 836 NW2d 182 (2013). The trial court's decision is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

III. ANALYSIS

The evidence established that the child sustained 40 fractures, which resulted from either squeezing and shaking the child, or crushing the child by squeezing him. The child was hospitalized for about 10 days and was in such pain that he required a morphine drip, which gave him a continuous infusion of morphine. The child was also on oxygen for breathing difficulties. The court concluded that the father inflicted those injuries, based on the mother's testimony and the medical evidence. The mother described instances of the father's past improper handling of the child and his past assaultive behavior involving others and expressed her belief that he caused the child's injuries. The court's decision was based on its credibility assessments of the mother and father's testimony, and this Court defers to those findings. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The evidence supported termination of the father's parental rights under MCL 712A.19b(3)(b)(i), (g), (j), and (k)(iii).

The mother argues she had no reason to know the father was abusing the child. However, the evidence established that the mother was fully aware of the father's violent tendencies, which included threats against her family, smashing a store window, and choking someone during another incident. The mother was also fully aware of the father's prior improper handling of the child. The mother disregarded these clear warning signs and continued to permit the father to be alone with the child. She failed to provide proper care and custody for her infant when the child was seriously injured in her care. Even if she did not inflict these injuries, the fact that the child was injured while she was one of the caregivers indicates that she failed to provide proper care and custody. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). Her failure to heed the warning signs supports a finding that she would be unable to provide proper care and custody for her child in a reasonable time frame given her child's age, and that there is a reasonable likelihood of future harm to the child in her care. The trial court did not clearly err in terminating the mother's parental rights under MCL 712A.19b(3)(b)(ii), (g), and (j).

Both respondents contend that error occurred when petitioner failed to provide them with reunification services. We disagree. Generally, reasonable reunification efforts must be made to reunite the parent and child. However, such efforts are not required where aggravating circumstances exist. *Mason*, 486 Mich at 152; MCL 712A.19a(2). Here, reunification services were not required because the child suffered severe physical abuse. MCL 722.638.

Both respondents argue that the trial court erred in concluding that termination was in the child's best interests. We disagree. In deciding a child's best interests, a court may consider the child's bond to his parent, the parent's parenting ability, the child's need for permanence, stability, and finality, and the suitability of alternative homes. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (internal citations omitted).

In this case, a preponderance of the evidence established that termination of both respondents' parental rights was in the child's best interests. The evidence established father had

seriously abused the child, and had a history of assaultive behavior and violent tendencies which he failed to completely acknowledge. He also had a substance abuse issue. The results of father's court-ordered psychological evaluation revealed a personality trait of being suspicious and distrustful of others and, because of it, he was likely to perceive hostile intent from others when it did not really exist, act out in anger, and possibly physically harm the child. Despite the mother's bond with her child, she had poor decision-making skills, as well as dependency and insight issues, all which required lengthy treatment to resolve. The evidence also established that she was still using marijuana. Given these circumstances, the trial court did not clearly err in concluding that termination of both respondents' parental rights was in the child's best interests.

Respondent father argues that reversal is required because of the admission of evidence that he failed a polygraph examination. This unpreserved issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Respondent relies on *People v McGee*, 268 Mich App 600, 630; 709 NW2d 595 (2005), which holds that plain error results when a jury is presented with a reference about taking a polygraph test. However, the factfinder in this case was a judge and, unlike a jury, a judge is presumed to understand the law, including what evidence is admissible and not admissible, and to consider only the evidence properly before it. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007); *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). In any event, reference to a polygraph does not always constitute error requiring reversal. Instead, a number of factors must be analyzed to determine if respondent was so prejudiced that reversal is required, including (1) whether an objection was raised; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *McGee*, 268 Mich App at 631. While there were two references that the father failed a polygraph, there was no objection, which weighs against a finding of prejudice. *Id.* Moreover, neither of the references were attempts to bolster a witness's credibility. Given all these circumstances, there was no plain error requiring reversal.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly

/s/ Michael J. Riordan